THE STANDARD OIL AND TOBACCO CASES.

IN an article called "The Federal Anti-Trust Act," published in the HARVARD LAW REVIEW in March, 1910,[1] the writer of the present article, after reviewing every decision on the Act rendered by the Supreme Court up to that time, stated as a conclusion that business and law had "got into what it is little exaggeration to call an *impasse*."

As a general summary of the rules of law to be drawn from these decisions the following was ventured:

"Any combination which directly restrains interstate trade is illegal. Trade is restrained by the ending or limiting of competition among the members of the combination as well as when the business of others is injured; it is not necessary that competition of outsiders be destroyed or affected. The restraint need not be unreasonable. The actual effect of the transaction on prices is not a determining factor; it is sufficient if a power to raise prices is acquired or increased. This power need not be broad enough to cover the whole country; indeed, its possible exercise may embrace only comparatively narrow limits. A 'direct' restraint imports not only that the restraint be the proximate result of the combination, but also in some degree substantial. Whether the court will hold any given restraint trifling and negligible or substantial and 'direct,' there is no rule to determine. A holding company is a combination." [2]

The supremely important propositions of the above summary are that the ending of competition merely among the members of a combination is illegal; and that corporate combinations are subject to the Act. As in every case of a corporate combination, competition of course wholly ceases among those combining, it appeared probable that every great corporate combination in the country was liable to prosecution and dissolution under the Anti-Trust Act.

Not until the decisions of the Circuit Court of Appeals for the Southern District of New York in 1908 which decreed the dissolution of the American Tobacco Company,[3] and of the

[1] 23 HARV. L. REV. 353. [2] 23 HARV. L. REV. 373.
[3] United States *v.* American Tobacco Company, 164 Fed. 700.

Circuit Court of Appeals for the Eastern District of Missouri in 1909 which decreed the dissolution of the Standard Oil Company,[4] did general recognition of the practical significance of the law become acute. Public attention thereupon was concentrated on the Supreme Court to a greater extent than ever before in its history. Would the Supreme Court dealing with the Standard Oil and Tobacco cases on appeal confirm the existing interpretation of the Anti-Trust Act? That was the question which agitated the commercial world for many months.

The decisions, when they came, justified those who believed that the logic of facts was stronger than the logic either of theories or even of tolerably well settled law. In the two great recent cases, the Supreme Court effectually changed existing law. Confronted by a crisis, the judges had to choose between intellectual consistency and the practical demands of a difficult situation. In preferring the latter they merely obeyed a characteristic trait of the English-speaking race.

In this article it is proposed first to state and discuss the facts and opinions in the two cases recently decided; second, to state the principles of law and rules of conduct fairly to be drawn from these cases; third, to consider very briefly the effect of the decisions on the trust problem.

I.

The vital words of the Anti-Trust Act under which the proceedings in both cases were brought are found in the first two sections and are as follows:

"SECTION 1. Every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce among the several states or with foreign nations is hereby declared to be illegal. [Such acts are made criminal and penalties provided.]

"SECTION 2. Every person who shall monopolize or attempt to monopolize, or combine or conspire with any other person or persons to monopolize any part of the trade or commerce among the several states or with foreign nations shall be deemed guilty of a misdemeanor and . . . [Penalties are provided]."

[4] United States v. Standard Oil Company of New Jersey, 173 Fed. 177.

Standard Oil Case.[5]

The decree of the court below was against seven individual defendants, the Standard Oil Company of New Jersey, thirty-six other American corporations, and one foreign corporation. Four corporations did not appeal from this decree.

To state accurately the facts on which the decision rests is difficult, for the following reason: The court summarizes the averments of the bill, but does not expressly state what averments are found to be true. It speaks of the evidence as "a jungle of conflicting testimony covering a period of forty years." From the general findings of fact, and from the characterization of the acts and doings of the combination, however, it is a fair inference that the specific facts very briefly summarized below were found by the court to be true.

In 1870 John D. Rockefeller, William Rockefeller, and several other individuals who previously had composed three separate partnerships, organized the Standard Oil Company of Ohio. To this company they transferred the business of the three partnerships. Shortly afterwards, several other individuals, including some of the defendants, transferred their plants and business either to the corporation or to individuals as trustees, who held the property so conveyed for the benefit of the stockholders of the Standard Oil Company of Ohio in proportion to their stock ownership. By the year 1872 the combination had acquired all but three or four of the thirty-five or forty oil refineries located in Cleveland. Some of these were dismantled, and some were continued in operation. Subsequently other refineries situated in New York, Pennsylvania, Ohio, and elsewhere were acquired. The combination also obtained control of the pipe lines. It obtained preferential rates and rebates from railroads. By these means many competitors were either forced to become parties to the combination or were driven out of business. During the period from 1870 to 1882 the combination acquired control of ninety per cent of the business of producing, shipping, refining, and selling petroleum in the United States.

In January, 1882, all or part of the stock of forty corporations and limited partnerships forming or affiliated with the combination, including all the stock of the Standard Oil Company itself, together with considerable tangible property, were conveyed to nine trus-

[5] Standard Oil Company of New Jersey *v.* United States, 221 U. S. 1 (1911).

tees. The trustees were to hold the trust property for twenty-one years after the death of the last survivor of the trustees unless the trust was sooner terminated by vote of the shareholders in the trust. Under the trust agreement the trustees were given very broad powers to carry on and to extend the business of the combination. Among other corporations organized by the trustees was the Standard Oil Company of New Jersey.

In March, 1892, the Supreme Court of Ohio decided that the making and operation of this trust was beyond the corporate power of the Standard Oil Company of Ohio, and also that it was illegal in itself as being in restraint of trade, and amounting to the creation of an unlawful monopoly. It was therefore voted by the trust certificate holders to terminate the trust, but whether the subsequent proceedings actually amounted to a complete dissolution of the same appears to be doubtful. At this time the trustees held stock in eighty-four companies. They transferred the shares of sixty-four of these companies to the remaining twenty, of which the Standard Oil Company of New Jersey was one. Twenty companies then held shares of sixty-four other companies. Trust certificates were then exchanged for stock of these companies.[6] As the nine individuals who were trustees held, themselves or through their families or associates, much more than a majority of the trust certificates, they held after these proceedings much more than a majority of the shares of the twenty stock-holding companies. The control of the combination therefore remained in the same hands.

In January, 1899, the charter of the Standard Oil Company of New Jersey was amended so that it had very wide powers, and so that its capital was increased from $10,000,000 to $110,000,000. The seven individual defendants continued to be a majority of its board of directors. The shares of the other nineteen stockholding companies were then transferred to the Standard Oil Company of New Jersey in exchange for its common stock, and this stock was then distributed among the shareholders of these nineteen com-

[6] There were outstanding at this time 972,500 shares of the par value of $100 each of trust certificates. On the dissolution each holder of trust certificates was to receive 1/972,500 of all the stock of the twenty stock-holding companies for each certificate he held. No trust certificate holder was permitted to take a share of stock in any one or more, less than all, of the twenty companies, but was obliged to take a share in all. Not all certificate holders came in under this arrangement.

panies. The New Jersey corporation also acquired stock of still other companies.

The combination continued to receive rebates and discriminations from railroads, made contracts with competitors in restraint of trade, indulged in local price-cutting, spying on competitors, and the operation of bogus independent companies. Of course it arranged matters so that there was no competition between its own subsidiary companies.

The court found generally that there had been consistently an acquisition of every efficient means by which competition could have been asserted; that means of transportation had been absorbed and brought under control by slow but resistless methods; that the country had been divided into districts and the trade of each district taken over by a designated corporation within the combination and all others excluded. It characterized the acts and doings of the combination in the following words:

"we think no disinterested mind can survey the period in question without being irresistibly driven to the conclusion that the very genius for commercial development and organization which it would seem was manifested from the beginning, soon begot an intent and purpose to exclude others which was frequently manifested by acts and dealings wholly inconsistent with the theory that they were made with the single conception of advancing the development of business power by usual methods, but which, on the contrary, necessarily involved the intent to drive others from the field, and to exclude them from their right to trade, and thus accomplish the mastery which was the end in view." [7]

It was held:

1. That the Anti-Trust Act prohibited unreasonable or undue restraint of interstate trade or attempts to monopolize the same in any and every form.

2. That the mere transfer to the New Jersey corporation of the stocks of so many other corporations which might have become competing corporations, even if they were not actually so before the transfer, created a *primâ facie* case or presumption of an intent and purpose to dominate the oil industry illegally, that is, by interfering with the right of others to trade, and so to restrain interstate trade unduly.

3. That this presumption was made conclusive by the continued

[7] 221 U. S. 76.

course of conduct of the persons interested; by the way in which the power acquired had been exerted; and by the results which occurred; because all these showed a purpose to control the situation by preventing free action on the part of others.

4. That the combination was illegal under both the first and second sections of the Act.

The opinion of the court was delivered by White, C. J. He states that the legal problem at hand is to discover the meaning of the first and second sections of the Anti-Trust Act. It appears to the writer that the process adopted by the court in ascertaining this meaning was to wipe the slate clean and start afresh. If there had never before been a decision on the Anti-Trust Act, the construction adopted in the Standard Oil case could hardly have been reached more independently than it was. This construction was based, not on the authority of previous cases on the statute, but on a practically *de novo* consideration of the Act in light of its intent and of general legal principles.

To arrive at the meaning of the words "restraint of trade" and "monopolize" as used in the statute, the court first discusses the meaning of those terms at common law. This discussion is a piece of exquisite exposition.

Starting with the technical or rudimentary monopoly, namely, a grant by the sovereign power of the exclusive right to trade in a particular commodity, and the real or technical contract in restraint of trade, namely, a voluntary restraint put by contract by an individual on his right to carry on his trade, it is shown that both the general and the specific evil results of each were, broadly speaking, the same. The general result was the acquisition of power to control the situation; the specific results were the creation or enlargement of power to fix prices, the limitation of production, and the deterioration of product. Because these results were an injury to the general public the acts or conditions causing them came to be held illegal. As time went on, it was seen that the same evil results were frequently brought about by acts and conditions which were technically neither monopolies nor restraints of trade. Attention was naturally directed to the results. Thus, by a perfectly natural mental process, acts which brought about the baneful effects of monopolies or restraints of trade were in the course of time referred to as monopolies or restraints of trade, and the scope

of these terms was much enlarged. As opinion on economic or trade matters varied from time to time, acts which at one time were thought to produce the evil results of monopolies and which therefore were treated as illegal, were at another time believed not to produce such results and were in consequence treated as legal. The history of engrossing, regrating, and forestalling illustrates this. Although opinion as to specific acts changed, the principle or formula by which the acts were tested remained the same. The broad question was always this: "Is this a case where the general public is injured?" If the acts constituted an attempt to acquire power to control the situation, a power which may be designated monopoly control; or, what is generally involved in any such attempt, if they constituted an interference with the free right to trade of persons not responsible for or connected with the acts in question, that is, persons who were outsiders to the transaction, the answer was, — yes. If, on the other hand, the acts could fairly be considered merely as efforts to forward the personal interest of those acting and not to acquire monopoly control, the answer was, — no.

The next step in the court's reasoning is thus described by itself in the opinion in the Tobacco case:

"Applying the rule of reason to the construction of the statute, it was held in the Standard Oil case that, as the words 'restraint of trade' at common law and in the law of this country at the time of the adoption of the Anti-Trust Act, only embraced acts or contracts or agreements or combinations which operated to the prejudice of the public interests by unduly restricting competition, or unduly obstructing the due course of trade or which, either because of their inherent nature or effect or because of the evident purpose of the acts, etc., injuriously restrained trade, that the words as used in the statute were designed to have and did have but a like significance." [8]

By regarding the spirit or fundamental basis of the prohibitions against restraints of trade at common law, and relying on this rather than on the definite prohibitions themselves, the court thus arrives at the proposition that the test of illegality under the statute is whether the assailed transaction or condition (in this case the existence of the combination in the form of a holding company) represents a purpose to acquire monopoly control, or what is, prac-

[8] 221 U. S. 179.

tically speaking, the same thing in the case of a corporate combination, whether it represents an interference with the right of others to trade.

The decision itself rests on nothing less than the whole course of conduct of the persons and corporations involved, although acts done before the passage of the Anti-Trust Act were considered only in arriving at the intent with which subsequent acts were done. The principal specific act relied on by the court was, of course, the transfer of shares by the nineteen stockholding companies to the New Jersey corporation. This was the only definite act of combination after 1890, when the Anti-Trust Act was passed.

It is worth while to analyze the court's treatment of this transfer of shares. In the first place it must be noted that the court, in this particular case, had to take a step in the process of reaching its conclusion, which would not ordinarily be necessary in dealing with a combination. The court had, in effect, to come to the conclusion that the twenty corporations concerned stood on the same basis as competing corporations, or perhaps it would be better to say as independent corporations not definitely combined under one control. That they were not actually competing corporations was the point chiefly relied on by the defense in the pleadings and most strongly urged by counsel for the defense in the argument. The argument was this: All these twenty companies were controlled before the transfer by the same persons who afterwards controlled the New Jersey company. Therefore the transfer of stock accomplished nothing. Is the situation any worse as regards restraint of trade when the shares of nineteen companies are held by one corporation, the stockholders of which previously held in the same proportion the shares of the transferring corporations, than when the shares of all were held by the present stockholders of the holding company?

To this the court answered very truly: "It is." The reasoning in reaching this conclusion must have been something like this: Many or even comparatively few individual stockholders may cease to act together; when some die their stock will be distributed, perhaps widely so; some may sell stock in one or more corporations and retain stock in others; even if none of these events occur the practical convenience of controlling one corporation is vastly greater than that of controlling twenty. It is a different thing alto-

gether. If there are twenty or forty distinct corporations, even if the stock of all of them is held by the same individuals in the same proportions, competition between the corporations is likely to ensue, if not immediately, at least sooner or later.

Having thus arrived at the point of considering, for the purposes in hand, the transferring corporations and the New Jersey corporation on the same basis as any twenty competing corporations engaged in a trade, the court found the mere transfer to the New Jersey corporation to make out a *primâ facie* case of an intent to dominate the trade illegally. The case, however, was only *primâ facie*. If it could have been shown that the combination effected by the transfer was simply and solely for the purpose of securing greater industrial efficiency, and was entirely unaffected by any attempt or intent to acquire monopoly control, or in other words to interfere with the competition of outsiders, the *primâ facie* case or presumption would have been rebutted. In other words, and here is where the great change from the previous interpretation of the Act was made, the court refused to hold that the mere ending of competition among the twenty combining companies was of itself illegal.

In the case under discussion there was not only nothing to rebut the presumption, but on the contrary facts, consisting of the continued conduct of the persons interested and the results attained, which made the presumption conclusive. The court might have said in explaining its decision: "These corporations must be kept apart, because the whole course of conduct of those responsible for them shows that they have used, do use and will use their unified power to oppress the public and to kill off and prevent competition by unfair methods. Other twenty companies which can show that they have no such purpose may come together."

The most striking phase of the decision is the determination that combination is not necessarily illegal, and the converse proposition that combination is unnecessary to bring a case within the statute. In the great previous case on the statute, the Northern Securities case,[9] the whole controversy revolved around the question of finding a combination, the difficulty of doing which proved a stumbling block to four members of the court. In the Standard Oil case technical questions do not trouble the court in the slightest degree.

[9] 193 U. S. 197 (1904).

Without argument it assumes that the Act applies to the prohibited evils in any and every form whatsoever. It clearly appears that the Act would have been held violated even if the New Jersey corporation had acquired the actual plants of the other companies.

The construction of the Act thus adopted by the court in this case made a substantial change in the law. To state the change accurately it is necessary to draw a distinction between loose combinations, where independent identities are maintained, and corporate combinations, where identities are merged, in a word, between combinations by fusion and combinations by agreement. There has been much unnecessary confusion of thought in many of the Anti-Trust cases through failure to make this distinction. Yet the two forms of combination are inherently different and must be treated differently. It is a great misfortune that the distinction between loose combinations and fusion is not clearly made in this case, it being evident that the court properly applies a different test to each.

Former cases decided that any "direct," that is, any substantial, restraint of competition is illegal; that trade is restrained by the ending or limiting of competition among those who voluntarily combine, whether in the form of a corporation or not, and that this is true whether or not the combination affects the competition of outsiders, that is to say, of those who, if left free to act, would prefer to compete. This case decides that the test of illegality as to combinations by agreement is whether they lessen competition among those combining in a way or to an extent which may reasonably be thought to injure either the competing or consuming public. In other words it applies to such combinations precisely the same test which the common law applies to contracts in restraint of trade.[10] As applied to corporate combinations, and it is with a corporate combination that the decision deals, the test is not the termination of competition among those combining, necessarily complete and entire in every case of a corporate combination, but whether the combination directly affects the competition of outsiders. To express the same thing in different words: Former cases decided that the Act forbade the substantial lessening

[10] Of course combinations by agreement frequently have also for an object the direct purpose of preventing the competition of outsiders. Montague *v.* Lowry, 193 U. S. 38 (1904).

of competition by agreement or combination, and that the function of the court was merely to decide if competition had been substantially lessened in such manner. This case decides that the substantial lessening of competition is illegal only if in the opinion of the court the public is injuriously affected. There was then a change from prior law as to the test of illegality no matter by what name it is called.

An interesting controversy in which the court itself has taken sides has arisen as to whether the court, in this case, read the word "unreasonable" into the statute.

The court says, in the Tobacco Case, it did not. With great deference the writer insists that in effect it did. The court says that it did not decide that only unreasonable restraints of trade were illegal, but that it gave to the words "restraint of trade" a reasonable meaning; or construed them "in the light of reason"; or adopted the "rule of reason." In this case, however, in giving them a reasonable meaning, the court gave to the words "restraint of trade" the same meaning that they had at common law, and the common law reads the word "unreasonable" before the words "restraint of trade" wherever they occur. It is submitted that this particular meaning of those words is what the phrase "the rule of reason" was intended to cover. Of course the court might have meant something else by the "rule of reason," and in certain parts of the opinion, as mentioned later in this article, the court speaks as though it had meant something else. It might have meant the use of judicial intelligence in construing a doubtful statute, as distinguished from the use of mere perception in deciding whether a perfectly definite thing had been done. Of course it is entirely possible to give the words "restraint of trade" a reasonable meaning which is not equivalent to reading "unreasonable" into the statute. Previous cases gave the words a perfectly reasonable meaning in holding that they meant the lessening of competition to a substantial extent by combination or agreement. If this is what the court meant by its "rule of reason," it meant no more than that it acted as courts have acted from time immemorial, and as they always must act in construing a statute whose meaning is not precise. In such case, the emphasis on the "rule of reason" as a principle of law now applied to the Anti-Trust Act was entirely superfluous. It was not worth mentioning. It certainly did not

require an elaborate discussion of the common-law meaning of the words "restraint of trade" on which to base its adoption. This discussion, on the other hand, was appropriate to justify reading the word "unreasonable" into the statute.[11] That it was intended for this purpose seems evident from the following language of the court:

"And as the contracts or acts embraced in the provision were not expressly defined . . . it inevitably follows that the provision necessarily called for the exercise of judgment which required that some standard should be resorted to for the purpose of determining whether the prohibition contained in the statute had or had not in any given case been violated. Thus not specifying, but indubitably contemplating and requiring a standard, it follows that it was intended that the standard of reason which had been applied at the common law and in this country in dealing with subjects of the character embraced by the statute was intended to be the measure used for the purpose of determining whether, in a given case, a particular act had or had not brought about the wrong against which the statute provided." [12]

If this were an original judicial construction of the Act, the interpretation adopted could hardly fail to receive general approval from lawyers and laymen. The fact that a substantial change was made from the previous interpretation is, under all the circumstances, not sufficient reason for withholding general approval.

A mistake was made, however, in the effort, which could hardly be successful, to show that the construction adopted was not in conflict with prior decisions. The reasoning in this part of the opinion is a curious production, and suggests either intellectual jugglery or confusion of thought. Having used the "rule of reason" as something requiring an interpretation of the statute based on the common-law meaning of its words, that is to say, an interpretation equivalent to reading the word "unreasonable" into the statute, the court proceeds to use the "rule of reason" in the sense of meaning merely the use of judicial intelligence, for the purpose of showing that the earlier cases are followed. The argument runs something like this: The previous cases could not have been

[11] It might be said that previous cases struck out the word "unreasonable" generally implied before the words "restraint of trade" and that this case merely recognized that it was impliedly there.

[12] 221 U. S. 60.

decided unless the judges made some use of their reasoning powers. Therefore, the rule now adopted is really the same as that prevailing before. This ignores the fact that the use of judicial intelligence in the earlier cases produced a different result. In attempting to show that previous cases did not decide reasonable restraints of trade to be illegal, the court makes an effort to distinguish between the lack of power to take out of the statute a case plainly within it, and the necessity of deciding whether a case is in it or not. In light of what was actually done in the previous cases the distinction is not apparent. To the average man this sort of hair-splitting is irritating; and the irritation is not lessened by the involved language in which the reasoning is clothed, suggesting as it does some of Mr. Gladstone's speeches in the House of Commons, when he seemed positively anxious not to cast light on the subject under discussion. Evidently, however, the court is not entirely convinced by its own arguments, because it says:

"And in order not in the slightest degree to be wanting in frankness, we say that in so far, however, as by separating the general language used in the opinions in the Freight Association and Joint Traffic cases, from the context, and the subject and parties with which the cases were concerned, it may be conceived that the language referred to conflicts with the construction which we give the statute, they are necessarily now limited and qualified." [13]

It is not necessary to discuss former cases nor to quote from opinions of the court to show that the rule previously adopted was that all direct or substantial restraints of competition, whether reasonable or not, are illegal. The fact is obvious from a study of the previous cases, and it is not worth while to emphasize it.[14] It is always possible to say of statements of law in an opinion that they must be taken in connection with the particular facts in hand, and that when so taken they do not mean what they plainly say. But this much is certain. The statements of law in the earlier cases now attempted to be explained away were as pertinent to the decision of those cases, and as definite, as the statement of law insisted upon in the Standard Oil case is definite and pertinent to its deci-

[13] 221 U. S. 67.

[14] United States *v.* Trans-Missouri Freight Association, 166 U. S. 290 (1897); United States *v.* Joint Traffic Association, 171 U. S. 505 (1898); and see particularly opinions in Northern Securities Co. *v.* United States, 193 U. S. 197 (1904).

sion. There is no more reason for limiting the meaning or weight of the one than of the other. If the present case decides that only undue restraints are illegal, the previous cases decide that all restraints are illegal.

The remedy which the Supreme Court applied was this: The New Jersey company is directed to return to the stockholders of the subsidiary companies the stock which had been turned over to the New Jersey company in exchange for its stock. In the meanwhile the New Jersey company is forbidden to exercise any ownership or to exert any power directly or indirectly over the subsidiary corporations, and the latter are forbidden to pay any dividends to the New Jersey corporation or do any act recognizing the power of that company. The owners of stock of the subsidiary corporations are forbidden to do any act or make any agreements tending to produce further violations of the Anti-Trust Act. Six months is allowed to bring about the dissolution.

Harlan, J., delivered an opinion concurring in part and in part vigorously dissenting. He agrees that the Standard Oil Company of New Jersey and its subsidiary companies constitute a violation of both sections of the Act. He objects strongly to the adoption of the so-called rule of reason, and says very truly, "that the court has upset the long-settled interpretation of the Act." He sustains this by copious quotations from the opinions in previous cases, particularly, of course, from the Trans-Missouri Freight case[15] and the Joint Traffic Association case.[16]

He argues that the law having been settled by Congress, for the court to change it is performing an act of judicial legislation, and that there is a usurpation by the judicial branch of the government of the functions of the legislative department. In making this criticism the learned justice overlooks the fact that the law, as it stood before this decision, was not settled by Congress, but by the court. What Congress meant is very doubtful. There was just as much judicial legislation in deciding that restraint of trade covered all restraint as in deciding that it covered only unreasonable restraint. In fact the decisions on this Act constitute a long course of judicial legislation. The court in the Standard Oil case may be criticized, if one likes, for overruling previous decisions, but hardly on the ground that it was legislating.

[15] 166 U. S. 290. [16] 171 U. S. 505.

It did so no more than a court customarily does in interpreting a loosely worded statute, and acted with utmost propriety.

Finally, he makes a very good point of the practical difficulty there will be in deciding whether a combination is reasonable or undue, and suggests that much litigation may ensue.

American Tobacco Case.[17]

The court's statement of the undisputed facts in this case makes fascinating reading. Within the limits of this article it is impossible to set forth more than the barest outline.

The defendants in the case were twenty-nine individuals, sixty-five American corporations and two English corporations. The primary defendant was the American Tobacco Company, a New Jersey corporation. It maintained unified control over the combination through stock ownership, not, however, by the simple, obvious, and consistent method of itself holding the majority of stock of the various corporations, as in the Standard Oil case, but in the most devious, complicated, and roundabout ways imaginable. As a single typical example, the primary defendant owned less than half of the shares of the American Snuff Company, one of the principal defendants, directly, but owned practically all the shares of the P. Lorillard Company, one of the subsidiary defendants, and the P. Lorillard Company owned a very large proportion of the shares of the American Snuff Company. The only approach to a principle discernible in the scheme of stockholding which characterizes the combination is an apparent effort to obscure the real situation; although there came to be finally one principal corporation for each branch of the trade.

The short history of the combination, necessarily told in only general terms, was as follows: Before 1890 all products of tobacco in this country were marketed under strictly competitive conditions. The manufacture of tobacco in its various forms was successfully carried on by many individuals and concerns scattered throughout the country. The nucleus of the combination was the result of action on the part of certain manufacturers of cigarettes. There were five concerns which did ninety-five per cent of all the domestic cigarette business, but which manufactured and distributed less than eight per cent of the smoking tobacco produced in the

[17] United States *v.* American Tobacco Company, 221 U. S. 106 (1911).

United States. These companies were active competitors, and just before 1890 were engaged in fierce and abnormal competition. In January, 1890, these five concerns organized the American Tobacco Company of New York, having broad powers, and with a capital stock of $25,000,000. They conveyed the assets, business, good-will, and names of the old concerns to this corporation, which thereafter carried on the business of all.

Then followed an increase of capital and the purchase of the business of others engaged in the tobacco trade. The purchases were not confined to the cigarette business, but came to include every branch of the tobacco business, and also businesses which merely handled materials required in the tobacco trade. During the whole life of the combination prices entirely out of proportion to actual values were paid for competing concerns. In many cases the plants so acquired were dismantled and abandoned. For example, from 1899 to 1901, thirty competing concerns were bought out for $50,000,000 in cash or stock and were immediately closed. Many other concerns were acquired and their business continued. In practically every case covenants were taken from the vendors not to engage in the tobacco business for long terms. There was continually aggressive competition resulting in driving others out of business, or compelling them to enter the combination. For example, in the plug tobacco war the combination lowered the prices of plug tobacco below its cost and in the course of the competition actually lost $4,000,000. Until 1904 there were really three primary corporations controlling the combination, namely, the American Tobacco Company of New York, the Continental Tobacco Company, and the Consolidated Tobacco Company, the last named being a financing corporation. At that time these three companies were merged into the American Tobacco Company of New Jersey. This company was capitalized at $180,000,000 and is the primary defendant. Throughout the history of the combination six of the individual defendants were practically in control.

It was held:

1. That the Anti-Trust Act prohibited unreasonable or undue restraint of interstate trade or attempts to monopolize the same in any and every form. The construction of the Act adopted in the Standard Oil case is approved and reaffirmed without qualification.

2. That the facts in the case show an undue restraint of trade

because of the obvious intent proved to dominate and control the tobacco business by interfering with the right of others to trade.

3. That the combination in all its parts, whether regarded collectively or separately, and irrespective of control through stock ownership, is illegal under both the first and second sections of the Act.

The opinion of the court was delivered by White, C. J. Referring to the decision in the Standard Oil case, the court says that the present case

"if possible serves to strengthen our conviction as to the correctness of the rule of construction — the rule of reason — which was applied in the Standard Oil case, the application of which rule to the statute we now, in the most unequivocal terms, re-express and re-affirm." [18]

Again an attempt is made to show that the rule adopted is in accord with previous decisions; and again the attempt is unsuccessful. This time referring to what was done in the Standard Oil case the court elaborates the proposition that there is a distinction between the lack of power to take out of the statute a case plainly within it and the necessity of deciding whether a case is in it or not. On this point the court says:

"In other words, it was held not that acts which the statute prohibited could be removed from the control of its prohibitions by a finding that they were reasonable, but that the duty to interpret, which inevitably arose from the general character of the term 'restraint of trade' required that the words 'restraint of trade' should be given a meaning which would not destroy the individual right to contract, and render difficult, if not impossible, any movement of the trade in the free channels of interstate commerce, — the free movement of which it was the purpose of the statute to protect." [19]

Here again it is difficult to perceive any real distinction. What sort of act, or agreement, or combination, for instance, would the court hold to be a reasonable restraint of trade and yet, giving the words "restraint of trade" the reasonable meaning it does give them, decide to be forbidden by the Act? It might appear from certain language in the Standard Oil case [20] that the court felt that there were certain acts *ipso facto* illegal as being in restraint of trade, while other acts depended on surrounding circumstances. If this was

[18] 221 U. S. 180. [19] 221 U. S. 179. [20] Quoted *supra*, p. 37.

the court's meaning it is left obscure. In fact, if a distinction exists, it is thin and tenuous as gossamer. To quote, with great deference, words of the learned Chief Justice himself, "the difference between the two is therefore only that which obtains between things which do not differ at all." It seems to the writer that in attempting the impossible task of reconciling these cases with prior decisions, the court becomes involved in some confusion. This is indicated to some extent by the fact that the attempt in each case takes a different form. In the Standard Oil case the effort was to show that previous cases did not decide that reasonable restraints were illegal. In this case the effort is to show that the Standard Oil case did not decide reasonable restraints to be legal. Either contention, if sound, would sufficiently support the court's position. In relying on both the court seems to confess a suspicion of the unsoundness of each. After all, however, the importance of these decisions lies neither in the use of particular words, nor in the fact that a substantial change as to the test of illegality, no matter by what name it was called, was made, but in the fact that they represent a sound and enlightened interpretation of the Act. Moreover it is no more than simple truth to say that the opinions in these cases, considered at large, in their broad-minded and wise treatment of a matter of almost unparalleled difficulty are superb specimens of the highest form of performance of the judicial function.

The court is particularly successful in demonstrating the good sense and practical necessity of the rule adopted. The reasoning is sound and convincing. The statute cannot be interpreted strictly, that is, following the literal meaning of its words, and loosely, that is, according to its spirit and intent, at one and the same time. The court must decide which method of interpretation will secure the better results. If the statute is construed strictly and literally it will cover any and every combination, and nothing which cannot be tortured into a combination. As combinations may be either beneficial or harmful, and as there may be injurious restraint of trade even though nothing which is technically a combination exists, such an interpretation would at once destroy much that is good and permit much that is evil, and so cover both more and less than the statute intended. The reasonable construction is to follow the spirit and intent of the statute. Such an interpretation does not regard form, but covers all acts or conditions which inter-

fere with the rights of outsiders, and which may be referred to loosely as wrongdoing.

The court proceeds to test the undisputed facts by the rule adopted. The enumeration of the facts which lead the court to its decision is the most valuable part of the opinion. The court felt that there was a purpose to acquire dominion and control of the trade by excluding others or by interfering with the right of outsiders to trade, and therefore an illegal combination, for the following reasons:

The first combination was impelled by a fierce trade war which itself was evidently inspired by one or more of the persons who brought about the combination.

The acts which followed the forming of the combination, such as the plug war and the snuff war, and the war with the English producers, indicated the intention to monopolize the whole field either by driving competitors out of business or compelling them to become parties to the combination.

The way in which control was secured secretly and the actual results obscured, by devious methods of stockholding, showed a conscious wrongdoing with intent to obtain mastery. This intent is further indicated by the absorption of elements essential to the manufacture of tobacco products, such as tinfoil, liquorice, and boxes, which kept others out of the trade.

The expenditure of millions of dollars in buying plants which were not used but closed up was merely buying off competition.

The almost uniform practice of obtaining agreements from the vendors not to engage in the tobacco trade, regarded not as separate transactions, but as a whole, showed the same purpose, namely, to control the situation by excluding others.

The court expressly states that the decision is not based on the following facts:

Not because of the vast amount of property aggregated by the combination;

Not alone because many corporations were united by resort to one device or another;

Not alone because of the dominion and control which exists over the tobacco trade.

The principle laid down in the Standard Oil case, that the form in which the assailed transactions are clothed is immaterial, is re-

affirmed, and, if possible, accentuated. The court states the rule to be

"that the generic designation of the first and second sections of the law, when taken together, embrace every conceivable act which could possibly come within the spirit or purpose of the prohibitions of the law, without regard to the garb in which such acts were clothed." [21]

Under this broad rule of law the court finds the combination illegal in all its aspects. The ownership of stock by the primary defendant in the accessory and subsidiary defendants, and the ownership in any of these companies, one with the other, and among themselves, is illegal. The primary defendant, which was formed as a combination between other companies, is illegal in its very existence. Irrespective of the question of stock ownership, the relations of the companies by contract and otherwise make every part of the combination illegal.

The first paragraph of the decree could hardly be broader, and gives effect to the widest possible construction of the Act. It is:

"That the combination, in and of itself, as well as each and all of the elements composing it, whether corporate or individual, whether considered collectively or separately, be decreed to be in restraint of trade and an attempt to monopolize and a monopolization within the first and second sections of the Anti-Trust Act." [22]

Indeed the words, "whether considered collectively or separately," if understood to mean what they say, seem too broad. Considered separately, it cannot be that each and every part of the combination is illegal.

The court states that the only way to deal with the case is to give a wider application to the Act than ever has been done before. This is particularly true when it comes to the remedy. Evidently a mere decree forbidding stock ownership by one part of the combination in another would be insufficient even if it were possible to carry it out. The court's conclusion as to the proper remedy is summarized in the decree as follows:

That the court below, in order to give effective force to the decree, be directed to hear the parties by evidence or otherwise as it may deem proper for the purpose of ascertaining and determining upon

[21] 221 U. S. 187. [22] 221 U. S. 187.

some plan or method of dissolving the combination, and of recreating, out of the elements now composing it, a new condition which shall be honestly in harmony with and not repugnant to the law. Six months are allowed to do this. If the court below thinks best, the time may be extended for not more than sixty days. If a conclusion satisfactory to the court has not been reached at the end of the period allowed, the court below may grant a permanent injunction restraining the movements of the parties to the combination in interstate commerce, or it may appoint a receiver. During the time allowed for reconstruction all the defendants are restrained from doing any act to extend the combination further.

This is, of course, the most radical and striking remedy ever decreed under the Anti-Trust Act — one of the most striking and unusual ever provided for by a court of equity. The judicial branch of the government becomes, to all intents and purposes, an active party to a business reorganization.

In light of the near prospect of a final decree in this case, to discuss at this time any further the remedy provided by the Supreme Court would be premature.

Harlan, J., delivered an opinion concurring in part and in part dissenting, in which he reiterates the statements made by him in the Standard Oil case. In addition he suggests that, as the present combination was illegal under any possible construction of the statute, so much of the opinion as deals with the rule of reason is *obiter dicta.*

II.

It is now proposed to state as definitely as possible the rules of law to be drawn from these decisions. As a general summary the following is offered:

Any undue or unreasonable restraint of interstate trade is illegal. Trade is unduly restrained by agreements which lessen competition among those agreeing to an extent which may reasonably be thought to injure the competing or consuming public. Trade is also restrained unduly by acts, combinations, or mere conditions of existence, which represent a purpose to increase the trade of those who are parties to the assailed transaction or condition, by interfering with the right to trade of those who are strangers to such trans-

action or condition; or, in other words, a purpose to acquire monopoly control. Trade is not unduly restrained by the termination of competition among those who voluntarily combine in the form of a corporate combination. Nevertheless, the combination of a great number of previously independent corporations, certainly if by means of a holding company, and probably if by means of the purchase of plants outright, creates a *primâ facie* case of illegality. Given an undue restraint, the law can reach any possible form of organization or condition of existence in which such restraint is manifested. A single corporation in no way representing any combination may offend the Act. The issue is to be determined in each case by a consideration of all the pertinent facts, such as specific acts, general course of conduct, and results.

The above general summary may be made clearer by additional and more specific statements.

A combination may be made of any number of corporations in a given trade, and maintained by means of a holding company or through ownership of plants, provided it appears that, tested by actual facts, the combination represents a purpose not to acquire monopoly control, but some proper purpose, such as to secure greater industrial efficiency; to turn out a better product at a lower selling price; in a word, to share with the public the economic advantages lying in the fact of combination.

Nevertheless, as the mere formation of a great combination suggests an inference that there is an intent to control the situation, the burden of proving facts showing a rightful purpose is put on the combination.

A corporation, whether it represents a combination or not, may increase its business to any extent, even up to the point of acquiring the whole of a given trade, if it does so not by interfering with the right of others to compete, but by means of proper methods. Proper methods can be completely defined only after some decision which shall hold a great combination legal. The following are obviously proper methods; excellence of product, lowness of selling price, efficiency of management, skill in marketing of product, and ability to attract the custom of the public by reason of the above methods and by advertising. To meet increased trade acquired by proper methods, a corporation, whether it represents a combination or not, may increase its capital to any amount, extend its plant to any

size, and may purchase the plants of any persons or corporations who are genuinely willing to sell.

A corporation, whether it represents a combination or not, may not attempt to acquire monopoly control. It may not increase its trade by interfering with the right of others to trade, that is, by killing off or preventing the competition of outsiders by means of unfair methods. Unfair methods are many, and no general description can cover them all. Broadly speaking, they consist principally in acts which, *standing alone*, are not for the benefit of the corporation, but for the purpose of injuring others. For example, to give three specific instances, to sell goods at less than cost, to pay a large sum for the plant of a competitor and then abandon the plant,[23] to expend money in acquiring sources of supply to an extent very much greater than is needed or can be reasonably needed in the future, — are acts which, standing alone, do not benefit a corporation but injure it. Conceivably each of these acts might be proper to meet some special exigency. Probably, however, they are done respectively to kill off, to buy off, and to keep off competition. All clearly represent a purpose to acquire monopoly control. Other acts suggested by these cases which tend in varying degree to show an improper purpose are; securing rebates from railways, spying on competitors, selling low in one place to meet local competition, uniformly or generally making contracts with persons whose business is bought that such persons shall not compete for long periods in the future, and the operation of bogus independent companies. In the same class fall naturally discriminations, such as refusing to deal with competitors, or persons who deal with competitors.

Definite and certain rules of conduct are still lacking, and are sadly needed, but business and law are no longer in an *impasse*. Combination is not now illegal, though combination on a large scale, in that it constitutes a *primâ facie* case of illegality, is still perilous.

But the subject of attack is not the perfectly sound economic principle of combination, but monopoly control and unfair methods; loosely speaking, wrongdoing.

Throughout both opinions, it is the rights of outsiders, of strangers

[23] The injury to outsiders, it must be admitted, is here indirect, and therefore not entirely within the general rule suggested in this article. The intention to work an indirect injury, however, is obvious.

to the assailed transactions, which are insisted upon. The dominating note of the recent decisions is this warning addressed to business men: "You shall not interfere unfairly with the rights of others."

III.

It remains to consider where these decisions leave the trust problem, or, to put it more broadly, the general business situation.

Here again it is necessary to call attention to the distinction between combinations by agreement and combinations by fusion, namely, corporate combinations. It is unfortunate that there has been only one statute to apply to both. This has resulted in an effort to treat them on the same basis, and this effort has done much to obscure the economic situation and to defer a clear understanding of the trust problem. The course of decision may be briefly indicated as follows:

In the first instance it appeared that loose combinations were clearly forbidden by the Act, and their evil results were recognized by the court. The first effect of the Anti-Trust Act was to drive combinations into the corporate form. Then it was seen that similar evil results were due to corporate combinations, and the Act was applied to them on the same terms in which it had been applied to loose combinations. Still later it was perceived that to destroy all corporate combinations was flying in the face of sound economic laws. Therefore, in the recent decisions it was declared that only those representing an economic evil, namely, monopoly control, were subject to the Act. At the same time it was felt necessary to permit loose combinations also if they did not unduly restrain trade.

That the recent decisions, nevertheless, make a distinction, though apparently unconsciously, in applying a test of illegality, between combinations by agreement and corporate combinations, is shown by the fact that the complete cessation of competition among the members of a corporate combination is held to be not necessarily illegal. The distinction was one which must be made. It is a pity that it was not clearly and definitely made, especially with reference to the question of remedy. Because it produces many of the same evil results is not sufficient reason for treating the corporate combination on the same basis as the combination by agreement. In the case of combinations by agreement the persons

contracting are strangers to one another's business; the duration of the combination is temporary, and the bonds that unite it are weak; no sacrifice of individual identity is involved; the object is merely to restrict competition among independent business units; none of the real economic benefits of combination are secured; the operations of the combination are not subject to a publicity which will permit potential competition to know the facts; and, lastly, the combination by agreement can be definitely handled only by dissolution. None of these things is true as to the corporate combination.

The trust problem is really concerned with corporate combinations, and these alone are referred to in the following discussion.

The Standard Oil and Tobacco cases represent a sound analysis of the trust problem which must have been substantially as follows: The fundamental reasons why combinations are made are: 1. To secure the economic benefits of the fact of combination;[24] 2. To save the wastes of competition;[25] 3. To acquire monopoly control, that is, the power to dictate terms and fix rates.

Combinations founded and maintained on the basis of the first two reasons are inherently sound. They represent real economic value. Under proper conditions they result in better products and lower selling prices.

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[24] These are:

1. Opportunity for comparative administration and accounting among the several corporations merged.

2. Ability to buy in large quantities and therefore cheaply.

3. More perfect organization. This includes saving in salaries of higher officials. Where before there were paid vice-presidents and superintendents for each plant, there need now be only one superintendent and one set of higher officials for a district.

4. Ability to handle large orders.

5. Ability to sell in large quantities, and therefore at a smaller percentage of profit.

6. Ability to save charges of transportation by shipping from the plant nearest in location to the consumer.

7. Ability to utilize waste.

8. Opportunity for experimentation.

9. Ability to specialize labor.

The corporate combination has the following advantages over the constituent parts acting separately:

1. It can dispense with many travelling salesmen.

2. Its expenditure for advertising will be less.

3. It is in a stronger position to regulate credits.

4. It can regulate production.

See "A Statement of the Trust Problem," 16 HARV. L. REV. 79.

[25] See note 10, *supra*.

A combination founded or maintained on the basis of monopoly control, that is, power to deal arbitrarily with the situation, rests on a structure economically rotten and insecure in fact. If given a fair chance, competition will destroy it. Therefore, it is true to say that such a combination owes its very life to interfering with the rights of outsiders, which means, to the use of unfair methods. Monopoly control cannot exist except by an interference with the right of others to trade. A combination which does not interfere with outsiders, that is, which does not use improper methods, does not have monopoly control, no matter what its size or the extent of its business. It is true that a combination formed for a proper purpose, which by proper methods has acquired practically all of a given trade, has a potentiality of evil. Its power is great, and the temptation to use its power arbitrarily for its own benefit is correspondingly great. Assuming that a sufficient degree of publicity of its operations and affairs is required, however, it will, theoretically at least, be unable to misuse its power if it continues to rely only on proper methods. As long as its methods are fair, as long as it does not interfere with the rights of outsiders, outsiders in the form either of actual or potential competitors will keep it in order. Even in the extreme case where there is no actually existing competition the combination cannot raise prices or act in an arbitrary manner without inviting competition. When it does so potential competition will become actual competition, and if given a fair chance will reduce prices to the proper level. If competition is not given a fair chance, that is, if it is fought by unfair methods, the combination becomes an actual economic evil and, under the interpretation adopted, becomes subject to injunction under the Act. Conversely, a corporate combination founded and for a time maintained on the basis of monopoly control, that is, on the use of improper methods, if it relinquishes such methods ceases to be an economic evil, because it then becomes fairly subject to competition, and logically should not be subject to dissolution under the Act.[26] The whole question, therefore, comes down to the question of interference with outsiders, that is,

[26] Perhaps dissolution of corporate combinations in flagrant cases, like those here considered, may be justified as merely proper punishment. Moreover in the Tobacco case there was hardly a genuine fusion of the combining parts. Unless a corporate combination involves a real merger of its elements it should be dissolved.

to one of methods. It is the definite recognition of the above fact that gives the recent decisions their great importance.

The law as it existed before the recent decisions did not represent a sound analysis of the trust problem. The Act as previously interpreted went on the theory that Congress had decided that the ending of competition merely among the members of the combination was itself an injury to the general public. This is an entirely permissible position to take if the trust problem is considered from a sociological point of view. It may perhaps be better for the country for the law arbitrarily to insist on a larger number of units of business identity even at the expense of some loss of economic efficiency. Nevertheless, even from this point of view, it must be remembered that any arbitrary law is a confession of inability to handle a problem in a manner appealing to reason.

From an economic point of view, the theory of the previous decisions cannot be accepted. As shown above, there is no actual economic evil in a corporate combination so long as there is no interference with the right of outsiders to trade, that is, so long as proper methods are used.

The writer is decidedly of the opinion that the law should deal with the problem from the economic point of view. If this is done wisely the sociological question may safely be left to work itself out. It is by no means certain that with a fair field provided, the strictly business advantages of combination will outweigh the common desire for individual identity. It is true that men do not care to enter a hopeless fight; but the instinct to compete remains a primary characteristic of the American people and requires only opportunity to enter a contest which shall be fair. Human nature may well be too strong for a mere economic principle when the latter cannot call unfair methods to its aid. At any rate the law will have done its share if it insists on an absolutely fair and open path on which events may take their natural course, whatever that may be.

From an economic point of view it becomes continually clearer that what is needed is not the dissolution of existing combinations, nor the arbitrary prohibition of new ones, but the prevention of the evils which frequently if not usually accompany combinations. Unfair competition and discriminations must be forbidden by a law which shall be, so far as possible, actually preventive. In addition

it must be recognized that distinctions which it is easy and proper to make in theory are difficult to make when dealing with actual facts. There is unquestionably a dangerous potentiality of evil in all great combinations. This means both that they are likely to use unfair methods and also that great harm will be done if they do. Because of the fact that it is probably impossible to reach directly all forms of unfair competition without government supervision, such combinations should be directly supervised by the government to the end that unfair methods be discovered and prevented.[27]

In the article on the Federal Anti-Trust Act published in March, 1910, before referred to, it was said:

"It can hardly be endured that the law remain in its present state. The logic of events is certain to bring about a change either by continued judicial construction or by legislation." [28]

It was also said:

"Obviously judicial construction can hardly be expected to cover the ground wholly and finally, even with the freest use of that convenient fiction, 'what Congress must be held to have intended.'" [29]

That both these statements were warranted is indicated by the two recent decisions.

A substantial change in the law has been made. Judicial legislation could hardly accomplish more than it has done in these cases. It remains true that judicial legislation cannot do everything. A great step has been made towards the solution of the trust problem. It consists in the fact that attack is at last concentrated, not on combination on a large scale, but on the evils and wrongdoing which accompany combination. It remains to clear up the considerable remaining obscurity of the situation by embodying the principles of these great decisions in a statute which shall lay down clear and definite rules of conduct, and which shall not supplant but supplement the Anti-Trust Act as now construed.

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[27] The law ought also to define the terms on which combinations may be made and should insist on genuine fusion, either by requiring outright ownership of plants or in some similarly effective way.

[28] 23 HARV. L. REV. 377.

[29] 23 HARV. L. REV. 379.